IN THE

Supreme Court of the United States

October Term, 1963

No. 330

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Appellee,

against

HARRY FRIED,

Defendant-Appellant.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinions Below

In denying leave to appeal, Associate Judge Fuld of the New York Court of Appeals rendered no opinion, but his order denying such leave (unreported) is set forth in Appendix A hereto in full. The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 18 A. D. 2d 996, 238 N. Y. S. 2d 742, and is set forth in full in Appendix B; its order (unreported, and without opinion) granting amendment of the remittitur and denying reargument and a stay is set forth in full in Appendix C. A copy of the order appealed from is annexed hereto as Appendix D. The trial court, The Court of Special Sessions of the City of New York, County of New York, rendered no opinion.

Grounds on Which Jurisdiction is Invoked

(i) *The Nature of the Proceeding.* Appellant was convicted of the crime of Obscene Prints and Articles under Section 1141 of the New York Penal Law, for selling and

possessing two paper-covered books, entitled "Sex Cat" and "College for Sinners", and several sets of pictures of females in the nude and partially nude. Appellant was sentenced to sixty days in the workhouse, to be served concurrently, on each of the four counts of which he had been convicted.

The Appellate Division of the Supreme Court of the State of New York modified the judgment of conviction by dismissing the count relating to the book "Sex Cat" and, as modified, affirmed the judgment of conviction. Leave to appeal to the New York Court of Appeals has been denied.

Execution of the sentence has been stayed pending this appeal, by the July 8, 1963 order of Mr. Justice Stewart of this Court.

(ii) *The judgment sought to be reviewed* is the order of the Appellate Division of the Supreme Court of the State of New York, modifying, and as modified, affirming the judgment of conviction, dated, made and entered on March 26, 1963 (Appendix D). A timely motion for re-argument was denied by the Appellate Division in an order dated, made and entered on May 2, 1963 (Appendix C). A notice of appeal was filed in The Criminal Court of The City of New York, New York County (the successor Court to the Court of Special Sessions of the City of New York) on June 4, 1963, and in the said Appellate Division on June 10, 1963.

(iii) *The statutory provision believed to confer on this Court jurisdiction* of this appeal is 28 United States Code, Section 1257(2).

(iv) *Cases believed to sustain the jurisdiction*: *Smith* v. *California*, 361 U. S. 147; *Alberts* v. *California*, 354 U. S. 476; *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478; *Mapp* v. *Ohio*, 367 U. S. 643; *Roth* v. *United States*, 354

U. S. 476; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; *Kingsley Corporation* v. *Regents*, 360 U. S. 684; *Walker* v. *City of Hutchinson*, 352 U. S. 112; *In re Oliver*, 333 U. S. 257; *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96, *Thompson* v. *City of Louisville*, 362 U. S. 199; *Irvin* v. *Dowd*, 359 U. S. 394.

(v) *State Statute Whose Validity is Involved.* This is Section 1141 of the New York Penal Law, whose pertinent parts are set forth in full in Appendix E hereto.

Questions Presented

1. Whether Section 1141 of the New York Penal Law, as construed and applied in this case, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution because it punishes a bookseller for the sale of obscene material (a) in the absence of any proof of actual knowledge of its obscenity and (b) in the absence of any proof of constructive knowledge of its obscenity through notice given pursuant to Section 22-a of the New York Code of Criminal Procedure.

2. Whether said Section, as construed and applied in this case, is repugnant to the aforesaid due process clause, because it permits a finding of scienter as to all photographs sold on several different days, at a nominal and ordinary price (less than 7¢ per picture), when the sole proof of scienter is that on the first day, after the customer selected three sets of pictures in cellophane packs and placed them in front of the bookseller, the customer inquired if the bookseller had any better pictures and the bookseller replied that's all he had at the time, especially when the three cellophane packs contained pictures which could not possibly be deemed obscene (showing neither breasts, buttocks, pubic hair, nor genitalia).

3. Whether said Section, as construed and applied in this case, is repugnant to the aforesaid due process clause,

because it permits a finding of scienter as to the sale of a paper covered book, at a normal and ordinary price (50¢), when the sole proof of scienter is that after the customer selected the book from a rack, he held the book up before the bookseller, asked "How is this book?", and the bookseller replied that all of them are about the same, especially when many other books in the store were concededly not obscene.

4. Whether pictures of females in the nude and partially nude may be deemed criminally obscene, consistently with the aforesaid due process clause, when neither the female genitalia nor pubic hair is exposed or shown.

5. Whether a book "College for Sinners" may be deemed criminally obscene, consistently with the aforesaid due process clause, when it possesses some literary merit, omits any and all terms descriptive of the genital areas of the anatomy, contains no description or representation of any normal or abnormal sex act, contains no foul or vile language, but contains passages suggestive of abnormal or perverted acts relevant to its dominant theme, nowheres going beyond contemporary community standards in description or representation of nudity and sex.

6. Whether said Section, as construed and applied in this case to the materials described in the two preceding questions, is repugnant to the aforesaid due process clause because said materials are constitutionally protected as an exercise of freedom of speech and press.

7. Whether the appellant was deprived of liberty without due process of law, in violation of said due process clause, because the pictures upon which he was convicted were not described or identified with any exactness whatsoever, but were merely described in the language of the statute.

8. Whether the appellant was deprived of liberty without due process of law, in violation of said due process

clause, because of his conviction, and the affirmance of the conviction, on the basis of 60 photographs sold by appellant as to which no charge had been made, rather than on the basis of 12 innocuous pictures as to which he had been charged.

Statement of the Case

By information, appellant was charged in five counts with illegal possession and sale of certain allegedly obscene material: He was charged by two counts with the possession and sale of obscene pictures on January 18, 1961, and by three counts with the possession and sale of three paper-covered books, entitled "There Are No Angels", "Sex Cat", and "College for Sinners." Appellant was convicted on all five counts. He was also convicted of the illegal sale of several sets of obscene pictures on January 11 and 13, 1961, though he had not been charged with any such sale.

The sentencing court set aside the conviction on "There Are No Angels", as to which no evidence had been introduced, and sentenced appellant to sixty days in prison, concurrently, on each of the remaining four counts.

The evidence showed that each of the books had been sold at a price of 50¢, and that the pictures had been sold at a price of less than 7¢ apiece.

The police officer who bought the pictures testified that he had had no conversation with appellant on the only day charged in the information [January 18, 1961] (10),* and that he had had no conversations with appellant on an earlier occasion (January 13), when he purchased more pictures from the appellant bookseller (13). His sole conversation with appellant in reference to pictures was on

* Such references are to the pages of the record as filed in this Court.

January 11 when he saw appellant behind a counter, with a "drawer full of photographs" on his left; the officer selected three sets, "placed them on the counter in front of the defendant", asked him "if he had any better pictures and he [the defendant] told me that's all he had at that time" (11). The officer did not testify whether he had placed the sets next to each other, or stacked them vertically; since they were wrapped in sealed cellophane wrappers (17), he testified, "either one or possibly two of the pictures were exposed" (17-18). These sets constituted Exhibits 2, 2A and 2B, each of which contained pictures of a female without a showing of either exposed breasts, buttocks, pubic hair, or genitalia. The other pictures in these and the other sets consisted of a female in the nude or partially nude, but in no picture whatsoever did pubic hair or genitalia appear. There were no pictures showing any acts of intercourse, normal or perverted, and no pictures contained more than one subject.

As to the book "College for Sinners": the police officer testified that he went over to a book rack in the store where appellant was selling, looked through a selection of books, selected "College for Sinners" from the rack, held this 50¢ book up before appellant bookseller; the book was closed when taken off the stand and handed to defendant for wrapping. The officer said, "How is this book?", and the appellant bookseller told him "that all of them are about the same." (12, 18). No further evidence was offered as to scienter on any of the books.

"College for Sinners" admittedly possesses some literary merit. It omits any and all terms descriptive of the genital areas of the anatomy, contains no description or representation of any normal or abnormal sex act, contains no foul or vile language, but does contain passages suggestive of abnormal or perverted acts relevant to its dominant theme (see p. 30, *infra*), nowheres going beyond contemporary community standards in description or representation of nudity or sex.

The information itself did not describe or identify the pictures upon which the appellant was accused with any exactness whatsoever; they were merely described in the language of Section 1141.

Though no substantial federal constitutional questions were raised at the trial,[1] such questions were raised upon appeal below, and necessarily passed upon, as shown below.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, while the defendant was free on bail. In the briefs of the appellant before the Appellate Division, and in oral argument, all of the federal constitutional questions presented here were raised.[2]

Our Question 1—whether Section 1141 as construed and applied violates due process in the absence of proof of knowledge of obscenity—was raised at pages 12-14 of Defendant-Appellant's Brief in the Appellate Division. (The relevance of Section 22-a, through which the State may give constructive knowledge, was raised at pages 8 and 10 of said Brief, and is necessarily a subsidiary question fairly comprised within the question of constitutionality of Section 1141 in the absence of proof of knowledge of obscenity; the precise question as posed in our Question 1 was raised and argued during oral argument.) Our Questions 2 and 3—whether 1141 as construed and applied violate due process because of the absence of any proof of knowledge of contents—was raised at pages 12, 14-17 (re book) and 17-19 (re pictures) of said Brief. Our Question 4—whether the pictures involved are constitutionally

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[1] Though there was raised at the trial a claim of an illegal search and seizure, appellate counsel deemed this federal constitutional question to be completely without merit, and it was neither argued nor pressed in the appeal.

[2] Certified copies of appellant's briefs in the Appellate Division have been filed in the Office of the Clerk of this Court, marked as Exhibit A.

protected—was raised at page 21 of said Brief. Our Question 5—whether the book "College for Sinners" is constitutionally protected—was raised at pages 23-25 of said Brief, and at pages 2 and 4-8 of Defendant-Appellant's Reply Brief. Question 6, is substantially a restatement of Questions 4 and 5, and was argued at oral argument. Question 7—lack of adequate notice to satisfy due process—was briefed at pages 8-10 of Defendant-Appellant's Brief and at page 13 of his Reply Brief. Question 8—due process violation by conviction on charges not made—was briefed at pages 8 and 10-11 of his Brief and at page 12 of his Reply Brief.

In an order dated March 26, 1963, the Appellate Division affirmed the judgment of conviction by dismissing the third count as to the book "Sex Cat", on the ground that there was insufficient evidence of scienter thereof. As so modified, it affirmed the conviction.

While defendant was free on bail, application was made to Associate Judge Fuld of the New York Court of Appeals for leave to appeal to the Court of Appeals. Said leave was denied by Judge Fuld on April 17, 1963, because, in his "opinion, no question of law was presented, which ought to be reviewed by the Court of Appeals".[3] Judge Fuld further noted, in his certificate denying leave to appeal, that in the application for the certificate it was "argued that the order of the Appellate Division * * *, modifying, and as modified affirming the judgment of conviction of defendant-appellant * * *, * * * is contrary to the United States Constitution, Fourteenth Amendment, because said statute, as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution, as more fully set forth in defendant's briefs filed in the said Appellate Division, and submitted

[3] Such a denial by one Judge of the Court of Appeals precludes any further right to appeal in New York. *People* v. *McCarthy*, 250 N. Y. 358.

before me, and in that defendant was otherwise deprived of liberty without the due process of law required by the said Fourteenth Amendment to the United States Constitution, as more fully set forth in said briefs submitted before me."

Thereafter, a timely motion for reargument was made to the Appellate Division, together with a motion for amendment of the remittitur and for a stay. The aforesaid motion was granted solely to the extent of amending the remittitur to show that "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: defendant-appellant contended that he was deprived of liberty without due process of law in violation of the Due Process of Law clause of the Fourteenth Amendment to the United States Constitution, and that Section 1141 of the New York Penal Law, as construed and applied herein, is repugnant to the aforesaid due process clause. The Appellate Division, First Department, held that defendant-appellant was not denied due process in violation of such constitutional rights, and that the said statute, as construed and applied, was not in violation of the said constitutional provision."

Substantiality of Federal Questions

Inertia paralyzing the swing of the judicial pendulum in the field of obscenity law has not yet set in, but the pendulum itself swings back.

There seemed to be a new era of freedom for publishers and booksellers, at least in New York, after this Court's more liberal interpretation of the obscenity laws in *Roth* v. *United States* and *Alberts* v. *California*, 354 U. S. 476. In New York, the center of the publishing industry, booksellers understood from the decisions of this Court in *Kingsley Books* v. *Brown*, 354 U. S. 437, 442, and *Smith* v. *California*, 361 U. S. 147, and of a New York court in *People* v. *Douglas*,

12 A. D. 2d 194, 209 N. Y. S. 2d 734 (3rd Dept., 1961), that they could not be proceeded against in New York in the absence of actual or constructive knowledge of the obscenity of the materials involved. In *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 216 N. Y. S. 2d 369, 175 N. E. 2d 681, publishers and book dealers were told that they could be convicted only if the material involved was hard core pornography, objectively ascertainable. Scores of cases were thrown out of trial courts in New York City involving prosecutions for pictures of female nudes.

On January 18, 1961, over twenty different individuals were arrested and charged with the possession and/or sale of obscene pictures and/or books. In all of these cases, including cases where the pictures involved were much rougher than those in the case of appellant Harry Fried, the defendants prevailed, and were acquitted. In Harry Fried's case alone—the beginning of the judicial pendulum swinging back—there was a conviction, both on pictures and the book. Following the affirmance of Harry Fried's conviction by the Appellate Division, new raids were had by the police authorities; according to the press, over two score individuals now face prosecution on similar materials. Arrests were made not only on books, but on pictures as well, after the police officers, at a large meeting called for that purpose, were given the Police Department's and the District Attorney's interpretation of the meaning of the decision in the *Fried* case as to pictures (see *infra*, p. 21, fn. 10). The fate of at least two score booksellers may thus well be determined by what this Court does with the case at bar. The constitutional question of whether challenged materials are obscene is one peculiarly within the function of this Court. *Kingsley Corporation* v. *Regents*, 360 U. S. 684. We submit that the substantiality of the question of whether the materials here may constitutionally be deemed obscene is ripe for review.

While every day's newspapers apparently bring confirmation of increased activity on the obscenity front, as

evidenced by the number of petitions for certiorari filed in this Court within the past year or so in regard to obscenity convictions, the increasing frequency of obscenity cases is evidenced by the Post Office Department's recent release to the effect that during fiscal 1963, there was an increase in arrests of 25.8% for violation of the mail obscenity laws over the number of arrests in 1962, and a 96% increase over such arrests in 1960. Information Service, Post Office Department, General Release No. 122, 7/19/63. The liberalizing trend started by this Court's opinions in *Roth* seems to have been arrested; narrowness is not now crawling in, it is hurtling in.

It would seem patent, without further argumentation, that the whole question of obscenity law and the law governing the constitutional requirement of scienter needs review by this Court, if only from the fact that this Court has granted review in the case of *Jacobellis* v. *Ohio*, #164, Oct. Term, 1962 ("The Lovers") and in *Smith* v. *California*, #812, Oct. Term, 1962, ("Tropic of Cancer").

Each of the questions presented, those outlined in the preceding paragraphs and those referred to hereafter, relate to the fundamental rights of free expression and freedom of the press, and to due process of law. Each of the questions, we believe, is of sufficient public importance to merit plenary consideration.

1. Section 1141 of the New York Penal Law, as construed and applied below, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution because it punishes a bookseller for the sale of obscene material (a) in the absence of any proof of actual knowledge of its obscenity and (b) in the absence of any proof of constructive knowledge of its obscenity through notice given pursuant to Section 22-a of the New York Code of Criminal Procedure.

Any finding here that the appellant knew the materials sold to be obscene would have been absurd: Not only was there no evidence to that effect, but the selling prices for

the paper covered book (50¢) and the pictures (less than 7¢ apiece) were perfectly normal—certainly hard core pornography is not knowingly sold at such prices. Appellant contended below that the conviction in the absence of any proof of his knowledge of the obscene nature of the materials rendered the New York Statute repugnant to due process. By its affirmance of the conviction, the Appellate Division rejected this contention.

This case therefore presents this Court with what was termed the "substantial constitutional question" that it was able to avoid in *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 492, by construction of the federal obscenity statute and the evidence. There this Court held the statute to require proof that the publisher knew of the obscenity of its advertisers' material, even when the publisher was admittedly familiar with the work of the advertisers, this Court ruling that even such familiarity "cannot well be taken as an admission of knowledge that the advertisers' works were obscene." *Id.*, at 494, fn. 16. Here, there was nothing even to hint that the appellant bookseller knew the material sold to be obscene.

That this is a serious constitutional question is not merely indicated by the words of Messrs. Justices Harlan and Stewart in *Manual Enterprises*, but by their words in *Mapp* v. *Ohio*, 367 U. S. 643, 675, indicating that the appeal there should in their opinion have been decided on whether Ohio's obscenity law was valid as construed to punish "irrespective of the purposes * * * of possession or control * * * and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, * * *." And Justices Frankfurter and Whittaker agreed.

Moreover, Mr. Justice Black, as well as Mr. Justice Frankfurter, interpreted the decision of this Court in *Smith* v. *California*, 361 U. S. 147, to mean that

> "The Court invalidates the ordinance solely because it penalizes a bookseller for mere possession

> of an 'obscene' book, *even though he is unaware of its obscenity.*" *Id.* at 156 (emphasis ours).

Mr. Justice Frankfurter was in accord with this interpretation, as he wrote at 361 U. S. 161.

The question of whether "guilty knowledge or wrongful intent" is constitutionally required in obscenity prosecutions is presently before this Court in *Ohio* v. *Jacobellis*, No. 164, October Term, 1962, which this Court has set down for reargument next term. The question of whether there can be a conviction on material which a seller does not know is obscene is also pending before this Court on a petition for certiorari in *Williamson* v. *California*, No. 948, October Term, 1962.

Meanwhile, the high courts of several states have ruled that there must be proof of defendant's knowledge of the obscene nature of the materials involved in order to constitutionally sustain a prosecution.[4]

Any other rule would tend to restrict freedom of circulation of printed materials—for many booksellers would not dare to sell anything but the superpure, if they run the risk of becoming members of the criminal class by making an erroneous judgment on whether materials are obscene.[5]

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[4] *Demetropolis* v. *Commonwealth*, 342 Mass. 658, 175 N. E. 2d 259, 262 ("knowing it to be obscene * * *"); *Cohen* v. *State*, 125 So. 2d 560, 563 (Fla. 1961) ("knowledge of the obscene character * * * and * * * the state must prove such knowledge of the accused at the trial"); *State* v. *Hudson County News Co.*, 35 N. J. 284, 173 A. 2d 20, 23 ("* * * knowledge that the material is obscene."); *State* v. *Sul*, 146 Conn. 78, 147 A. 2d 686, 691 ("We hold that proof of knowledge that the proscribed material is obscene * * * is requisite to a conviction * * *").

[5] In the light of the confused and confusing status of the obscenity law in New York, such a risk is most substantial, as shown by actual cases. Examples: In New York County, a prosecution begun against a vendor of an issue of "Sunshine & Health", previous issues of

[Continued on page 14]

Of course, a *contra* consideration is the seeming inevitable difficulties in criminal law enforcement that would follow a requirement of scienter of obscenity in most states—but in New York, there is no difficulty whatsoever in law-enforcement authorities giving constructive notice to the bookseller through use of Section 22-a of the New York Code of Criminal Procedure. Indeed, this Court once construed 22-a to require that no criminal obscenity proceedings can be begun until after such constructive notice has been

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[Continued from page 13]

which had been cleared by this Court in *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372, was dismissed on the District Attorney's own motion [*People* v. *Salkind*, Information No. 12578/58, Ct. of Spec. Sess.]; in Queens County Court, the distributor of the identical issue was found guilty, and sentenced to a year in jail and a $2,000 fine, per Mr. Justice Scileppi (now a Judge of the New York Court of Appeals) [*People* v. *Cohen*, Indictment No. 1536/1959, appeal pending]. In New York County and in Queens County, no prosecution was even begun re "Tropic of Cancer"; by a 4-3 vote, it was ruled obscene by the New York Court of Appeals (opinion by Scileppi, J.), *People* v. *Fritch*, — N. Y. 2d —, — N. E. 2d — (not yet reported). Though the publisher of the April 1957 issue of "The Gent" magazine was acquitted in Kings County of a charge of obscenity [*People* v. *Brooklyn News Co.*, 12 M. 2d 768, 174 N. Y. S. 2d 813], the distributor in Richmond County was convicted, and the conviction reversed by a 4-3 vote in *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681. An issue of "Playgirl" magazine was ruled not *prima facie* obscene in New York County but six days later was ruled obscene beyond a reasonable doubt by the same court sitting across the East River in Queens County [*People* v. *Engel*, rev'd on other grounds, 7 N. Y. 2d 1002, 166 N. E. 2d 845; see Record on Appeal, p. 16].

"Strip tease" pictures were ruled not obscene in *Burke* v. *Kingsley Books*, 8 M. 2d 306, 167 N. Y. S. 2d 615; in the most recent trial (prior to the affirmance below) on such pictures in the same court in which appellant was convicted, some 25,000 pictures of nude and partially nude females were all unanimously ruled not obscene, though many were much rougher than the pictures at bar here. *People* v. *Kroll*, Spec. Sess., N. Y. County, Index No. 1233—1961. See, also, p. 21, *infra*.

given.[6] Now that the New York courts have ruled incorrect this Court's construction of 22-a—a construction relied upon by this Court in upholding 22-a—, we submit that it is entirely appropriate that this Court should now rule whether a bookseller, without actual or constructive knowledge of obscenity, may be imprisoned, though this Court had ruled such constructive knowledge a prerequisite to a criminal prosecution in New York.

2. The said Section, as construed and applied in this case, is repugnant to the said due process clause, because it permits a finding of scienter as to all photographs of females sold on several different days, at an ordinary price, when the sole proof of scienter is that on the first day, after the customer selected three sets of pictures in cellophane packs, he placed them in front of the bookseller, inquired of the bookseller if he had any better pictures, and the bookseller replied that's all he had at the time, especially when the three cellophane packs contained pictures which could not possibly be deemed obscene (showing neither breasts, buttocks, pubic hair nor genitalia).

The only proof of scienter of the pictures rested on the police officer's conversation with appellant on January 11, 1961—a week before appellant's arrest on the only pictures charged in the information (January 18). During the January 11 conversation, only one or possibly two of the pictures exposed by the cellophane wrappers were visible to the defendant. Each of these three sets (Exhibits 2, 2A and 2B) contain pictures which could not possibly be ob-

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[6] Said this Court: "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure *assures* him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer 'nervously among the treacherous shoals.'" *Kingsley Books* v. *Brown*, 354 U. S. 437, 442. (Emphasis supplied.)

scene—for they contain pictures of individual females without a showing of exposed breasts, buttocks, pubic hair or genitalia. It is, we submit, plainly irrational, arbitrary and unreasonable to charge defendant with knowledge of all pictures sold on three different days, because on the first day defendant was given an opportunity to see one or two pictures—which might have been entirely innocuous—and he replied that that was "all he had at that time" in answer to an inquiry as to whether "he had any better pictures." This finding of scienter here does not meet this Court's "insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards". *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66.

The importance of this question lies in the fact that the statute so construed makes a mockery of the constitutional requirement of scienter, even if scienter be construed to mean mere knowledge of contents rather than the knowledge of their obscenity. For a non-responsive non-committal reply, which is a disclaimer of scienter, is *ipso facto* turned into an admission of scienter, and indeed into an admission of scienter of pictures sold two days, and also a week, later! Holding this to be sufficient evidence of scienter not only flies in the face of due process by finding the defendant guilty though there is complete lack of evidence of guilt, as held in *Thompson* v. *City of Louisville*, *supra*, but also impinges upon freedom of speech of booksellers. For should this decision stand, no bookseller would ever be able to make any comment or response to a customer's inquiry, however innocuous, without being held to have knowledge not only of the contents of the material which is the subject matter of the inquiry, but also of other materials sold thereafter. This places a severe inhibiting effect upon freedom of expression; no bookseller, upon being asked if he has anything better—whether the question relates to literary merit, or what—may now reply

that this is all he has at the time, at the pain of becoming a criminal if he then—or even several days later—sells material which the judiciary later determines to be obscene. As construed below, the New York statute inhibits the freedom of a bookseller even more severely than the ordinance struck down in *Smith, supra*—for it penalizes the bookseller if he dare have an innocent conversation with a customer, inhibiting not merely the circulation of the materials, but inhibiting as well, comments by the bookseller, often necessary to transactions affecting the press. Patently, there was no civil way in which the appellant bookseller might have answered the officer's question which would have been *less* indicative of scienter than the answer given. It is plain that booksellers hereafter, should the decision below stand, must have no conversations with customers at all, if they are to be safe.

Had the sale price of the pictures been, say, $5.00 per picture, the situation might be different. But surely, when the pictures were sold at less than 7¢ apiece, it is plainly absurd, arbitrary and unreasonable to infer that the defendant was knowingly selling obscene materials at such a cheap price, publicly available for inspection by any casual customer—or by the police.

3. Said Section, as construed and applied below, is repugnant to the said due process clause, because it permits a finding of scienter as to the sale of a paper-covered book, at a normal and ordinary price (50¢), when the sole proof of scienter is that after the customer selected a book from a rack, he held it up before the bookseller, asked "How is this book?", and the bookseller replied that all of them are about the same, especially when many other books in the store were concededly not obscene.

It is solely upon the flimsy basis of the appellant bookseller replying "All of them are about the same" to the officer's inquiry "How is this book?" that the finding of scienter as to the book "College for Sinners", was made.

The comments we made above under "2" are equally applicable here: A paper-covered book is sold at a perfectly normal 50¢ price, a question is asked, and a completely non-committal answer is given. Had the inquiry been "How sexy is this book", then there might be some basis for finding scienter if indeed all the books were about the same. But here, a completely generalized question followed by a completely non-committal response is converted by the New York Courts into an admission of scienter. We repeat again that the most innocuous remark may now never be made by a bookseller at the risk of being charged with scienter. Here the remark was just the kind of innocuous remark frequently and typically made by booksellers who are not familiar with every book in the store.

Moreover, the books were not all about the same. As admitted by counsel for the People in oral argument before Judge Fuld, one other book from the store—"Sex Cat"—was not obscene. The third book with which defendant was charged, "There Are No Angels", was so innocuous that it was never presented to the trial court, though defendant was charged with its sale. (It had previously been cleared by a New York County grand jury.) And there were many other books on the shelves for which appellant was not prosecuted.

Assuming *arguendo* that defendant's comment that all of the books were about the same is tantamount to an admission of scienter, this case would then present the question of whether appellant could be found guilty if he made an honest mistake as to the contents of the material, the question left open in *Smith*, *supra*, which will be reargued before this Court in the Fall in *Jacobellis*, *supra*, and on which a petition for certiorari is pending in *Williamson* v. *California*, *supra*.

4. Pictures of females in the nude and partially nude may not be deemed criminally obscene, consistently with the said due process clause, when neither the female genitalia nor pubic hair is exposed or shown; the statute construed and applied to ban same is repugnant to the said due process clause.

The New York courts in the case at bar seem to be the only courts which in a post-*Roth* decision have held obscene pictures of the type involved here.

In *Monfred* v. *State*, 226 Md. 312, 173 A. 2d 173, *cert. den.*, 368 U. S. 953, the Supreme Court of Maryland held not obscene pictures of girls in striptease sequences similar to those here. In *Louisiana News Company* v. *Dayries*, 187 F. Supp. 241 (1960), a three-judge Federal Court held that pictures showing merely naked breasts and buttocks (as here) are constitutionally protected. Most recently, in *Excellent Publications, Inc.* v. *United States*, 309 F. 2d 362 (1st Cir., 1962), the First Circuit held that even when the emphasis of pictures of nudes and partial nudes is on "bare breasts * * * and buttocks", they are not "hard core pornography" as long as the genitalia are not exposed.[7] There is thus a conflict between the New York courts in the case at bar and those of the Supreme Court of Maryland and of a three-judge federal court. Moreover, there would seem to be nothing more offensive in the pictures involved here than in those found not obscene in this Court in *Manual Enterprises* v. *Day*, *supra*.

The entire question of what constitutes obscenity, within constitutional limits, in regard to photographs of female nudes and semi-nudes is in tremendous confusion

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[7] Though the New York Court of Appeals held in *People* v. *Richmond County News*, *supra*, that only hard core pornography was punishable under the obscenity law, the New York courts in the case at bar have impliedly ruled that pictures of nudes and partial nudes constitute hard core pornography even though they do not show female genitalia, pubic hair, or acts of intercourse or preparation therefor.

and chaos. The courts, including this Court, have been moving towards a rule that only hard core pornography is constitutionally punishable under the obscenity laws. From *Roth* to *Manual Enterprises*, the trend has been unmistakable along the way—consider *One, Inc.* v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35. The New York courts have given lip service to this doctrine in *Richmond County News*—but in its application to this case, the New York courts have proscribed as obscene pictures which show neither the pubic hair nor the genitalia when picturing female nudes—and such pictures have been ruled not obscene by other courts following the same test,[8] as well as by courts following the *Roth* test (*Monfred*, *supra*).

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[8] That the hard core pornography rule in New York bans much which would not generally be considered hard core pornography is also manifest from the Court of Appeals decision banning "Tropic of Cancer" in *People* v. *Fritch*, *supra*.

Since the decision in the case at bar was handed down by the Appellate Division, and after Judge Fuld had denied leave to review, the Court of Appeals, in the New York Tropic of Cancer case (*People* v. *Fritch*, *supra*), redefined hard core pornography as follows: "As can be plainly seen, the book is a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest. It is devoid of theme or ideas. Throughout its pages can be found a constant repetition of patently offensive words used solely to convey the debasing portrayals of natural and unnatural sexual experiences. It is a blow to sense, not merely sensibility. It is, in short, 'hard core pornography', dirt for dirt's sake * * *, and dirt for money's sake * * *." Mimeographed, unrevised and uncorrected opinion, p. 9. In the case at bar, "College for Sinners" has been held to be hard core pornography, though possessing theme and ideas, though no patently offensive words appear. It is difficult, therefore, to assess the meaning of hard core pornography in the New York law, especially when one is relegated to the definition that "It is a blow to sense, not merely sensibility."

Frankly, it is now absolutely impossible to tell which pictures of female nudes will now be judicially deemed obscene. Weighed against this decision is the case of *People* v. *Williams*, 17 A. D. 2d 678, 230 N. Y. S. 2d 346 (3rd Dept., 1962), leave to appeal denied, unreported, holding that none of the pictures in commonly available "girlie" magazines is obscene. Similarly, the First Department—the very court which decided the case at bar—so ruled after it rendered the decision in the case at bar, in the case of *Larkin* v. *G. I. Distributors, Inc.*, where the prosecutor argued that there was no discernible difference between the pictures in the case at bar and those of the girlie magazines involved in that case.[9] Surely, none of the pictures at bar go substantially beyond contemporary standards of frankness and candor in depicting nudity; hence they cannot be obscene, and are therefore entitled to the protection of freedom of the press.

Meanwhile, the New York police, as shown in Exhibit C,[10] have interpreted the decision to mean that all pictures of females focusing attention on bare buttocks con-

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[9] This decision is not yet reported, except in the New York Law Journal of June 21, 1963, at p. 11, col. 1. Several of the magazines ruled not obscene on the trial, as to which the prosecutor did not even appeal, are filed herewith as Exhibit B.

[10] In Exhibit C, filed with the Clerk of this Court, it was established that the exhibits of photographs in the case at bar were shown at a meeting of police officers (5/23/63 Minutes, pp. 56-9), the pictures being described as "photographs of females generally in semi-nude, nude attire, usually wearing a garter belt, where they were posed in such a manner as that their buttocks were projected towards the camera, and were accentuated with garter belts being worn, all in the manner of the type of photograph that was exhibited to them. They were further instructed that they were not to be concerned with photographs merely of semi-nude or nude females in poses other than the type that were displayed to them." *Id.* at 57-58 (*People* v. *Reshes*, Crim. Ct. of N. Y. C.).

stitute hard core pornography. (*Contra*: *Excellent Publications, Inc.* v. *United States*, *supra*.)

The confusion in New York is so great that in plain point of fact, all booksellers in New York City have discontinued the sale of *all* photographs of female nudes and partial nudes as a direct result of the decision in the case at bar, and the arrests following.

If pictures such as those at bar are to be deemed obscene under § 1141, then, we submit, the statute must be deemed void for too much vagueness. "For standards of permissible statutory vagueness are strict in the area of free expression." *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 432.

5. A book such as "College for Sinners"—possessing some literary merit, omitting any and all terms descriptive of genital areas, containing no description or representation of any normal or abnormal sex act, omitting all foul and vile language, but containing passages suggestive of abnormal or perverted acts relevant to its dominant theme, nowhere going beyond contemporary community standards—may not be deemed criminally obscene, consistently with the aforesaid due process clause; and the statute as construed and applied to render the book criminally obscene is repugnant to due process.

In the case at bar, the Appellate Division, rather than relying on *Richmond County News*, relied upon the narrower test laid down by the Court of Appeals in a later decision in *People* v. *Finkelstein*, 11 N. Y. 2d 300, 229 N. Y. S. 2d 367, 183 N. E. 2d 661, finding certain books obscene for the following reasons:

> "Each book contains descriptions of sexual experiences, with emphasis on the abnormal. They focus 'predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification.' [Citation of *Richmond County News* omitted]." 11 N. Y. 2d at 305.

What the Court below ignored, however, was that material cannot be constitutionally obscene under the test of *Roth, supra*, unless the material involved goes substantially beyond contemporary community standards of frankness and candor in depiction of nudity and sex. Certainly, there is nothing at all in "College for Sinners" which goes at all beyond current community standards. The book is much less frank in details of sex deeds than such recent best-selling novels as "The Carpetbaggers", "Peyton Place", "Valhalla", and many other books reviewed almost every week in the pages of the New York Times Book Review. There is nothing in the book at bar which remotely approaches the frankness and candor in description of sexual relations which now "appear as regular staples of literary diet", including books such as "Lady Chatterley's Lover". *Grove Press* v. *Christenberry*, 276 F. 2d 433, 438 (2nd Cir., 1960).

Indeed, there is no vulgarity whatsoever, no "dirty words" in "College for Sinners"; words plainly printed in best selling novels are replaced by blank spaces and dashes in this book. More simply stated, the book here simply pales by comparison with current best sellers. Since the community "cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates" [Mr. Justice Harlan, in *Smith* v. *California*, *supra*, 361 U. S. at 171], it is patent that this conviction cannot stand. The book simply lacks the quality of patent offensiveness required to hold material constitutionally obscene.

What the Appellate Division has done, by saying that obscene material is that which has emphasis on the abnormal, focuses predominantly upon the sexually morbid and grossly perverse and bizarre, is to take one prong only of the *Roth* test—the appeal to prurient interest prong—to determine automatically that material which focuses on the abnormal is *per se* material which appeals to the

prurient interest.[11] This, however, is to completely disregard the question of whether the material goes substantially beyond contemporary community standards—as it is disregarded in the statutory definition of obscenity in subsection 5 of § 1141. But merely focusing upon sexually abnormal or morbid materials is of course not in and of itself a cause of finding materials obscene, as this Court impliedly ruled in *One, Inc.* v. *Olesen*, 355 U. S. 371, where this Court cleared a male homosexual magazine; see also *Manual Enterprises, Inc.* v. *Day, supra.*

There is no dispute here that the book is merely suggestive, not candid. The District Attorney will so concede. We contend that suggestiveness is the opposite of obscenity. While we admit quite frankly that there are scenes here which are suggestive of so-called abnormal sex practices, we believe that suggestiveness must be the exact opposite of obscenity, for suggestion is certainly not candor and frankness. It is the opposite thereof. We contend, therefore, that this book cannot constitutionally be considered obscene.

6. Appellant was deprived of liberty without due process of law, because the pictures upon which he was convicted were not described or identified with any exactness whatsoever, but were merely described in the statutory language.

In the case at bar, there was no description of the pictures involved, except to term them by the epithets found in the statutory language. Since under New York law the words "lewd, lascivious, filthy, indecent and disgusting" mean precisely the same as the word obscene [*People* v. *Brooklyn News Co.*, 12 M. 2d 768, 174 N. Y. S. 2d 813], the charging language in the Information amounted merely to giving the defendant information that the pictures in-

[11] This test, applied to contemporary literature, might well ban much of the work of Tennessee Williams and William Inge, as well as James Joyce's "Ulysses".

volved were obscene, sadistic and masochistic. Of course, none of the pictures involved were sadistic or masochistic —so that what description there was was misleading—, and there was no way whatsoever of ascertaining from the Information which pictures would be introduced into evidence: one could not know if they were pictures of nudes, partial nudes, of males and/or females, of groups, whether they showed breasts, buttocks, genitalia, pubic hair, penises, or acts of intercourse. We contend that the failure to give some fair description of the pictures violated due process, as the New York Court of Appeals had previously ruled in what must now be viewed as an abandoned holding in *People* v. *Zambounis*, 251 N. Y. 94, 167 N. E. 183. *Zambounis*, the People successfully contended below, had been overruled by later decisions.

While this precise question has apparently not arisen in other appellate courts, this Court has generally noted that a person is entitled to be told of the charges against him in advance of hearing. *Walker* v. *City of Hutchinson*, 352 U. S. 112, 115; *In re Oliver*, 333 U. S. 257, 273; *Morgan* v. *United States*, 304 U. S. 1, 18-19. Indeed, only the other day, this Court ruled illegal and unconstitutional New York's denial of admission to a bar applicant for, among other reasons, failure to give him notice of charges in advance of the hearings, though major charges were disclosed to the applicant during the hearings, and the applicant given an opportunity each time thereafter to submit any further evidence he wished in regard thereto. *Willner* v. *Committee on Character and Fitness*, 373 U. S. 96.

This violation of due process was productive of much mischief here. Firstly, the prosecuting attorney invited the trial court to convict not on the basis of the mild pictures contained in Exhibit 1—the only pictures sold on the charged date of January 18—but on the basis of the other and somewhat rougher (though clearly not obscene) pictures sold on other dates, as to which the defendant had

not been informed against. The District Attorney, in inviting the Court to convict, asked the Court to convict on his description of pictures which could not have possibly referred to the pictures of Exhibit 1. See pages 24-25 of the Record. Secondly, though only one set of pictures was introduced as having been sold on January 18, 1961, the defendant was convicted and the conviction was affirmed on two counts for the same sale; defendant was thus convicted twice on one charge. Thirdly, though the Appellate Division ruled that the appellant should have objected to the variance between the Information and the proof adduced at the trial by objecting to their introduction into evidence, it was patently impossible for the appellant to have successfully so objected, for the simple reason that when six sets of pictures were introduced, he could not possibly have told which sets of pictures were the subject of the Information, and which were not, for he had no description of the pictures; in the absence of such information, any objection on the grounds of variance would have been fruitless, for one could not really have told with any precision or real understanding with what the defendant was charged, especially since the pictures were misleadingly described in the Information as being sadistic and masochistic.

The People will doubtless argue that the appellant had not attacked the Information and made no attempt to seek a bill of particulars. However, there is no requirement under New York Law that a constitutional question be raised prior to judgment; the usual way of raising constitutional questions is on motion after the defendant is found guilty. As to a bill of particulars, such a request would have been useless, inasmuch as under statutory law a bill of particulars cannot disclose evidence, and the New York courts have frequently ruled that bills of particulars consisting of pictures in obscenity prosecutions will not be granted. Such a ruling was had in *People* v. *Lynne O'Neill* (unreported) in the District Court of Nassau County in

Mineola, New York for this reason. The New York courts have consistently, and without exception, made such rulings in many cases including *People* v. *Kroll*, *supra*. In *Kroll*, Assistant District Attorney James F. Gill's affidavit (p. 19) of April 14, 1961, successfully took the following position:

> "The pictures and negatives in question are clearly evidence to which defendant is not entitled in a bill of particulars (Sec. 295-h, Code Crim. Pro.)."

And in any event, the amendment of the remittitur would render moot any question of such procedural problems under New York law.

7. Appellant was deprived of liberty without due process of law because of conviction and affirmance of conviction on the basis of sixty photographs sold by him as to which no charge had been made, rather than on the basis of twelve innocuous pictures as to which he had been charged.

Though charged with sale of obscene pictures on January 18, 1961, appellant was convicted on the basis of six sets of pictures, including five sets of pictures sold on days other than January 18. It seems patently clear that the appellant was convicted of crimes with which he was never charged.

Clearly, conviction on a charge not made violates due process. In *Thompson* v. *City of Louisville*, 362 U. S. 199, 206, this Court unanimously held, quoting from *De Jonge* v. *Oregon*, 299 U. S. 353, 362, that

> "Conviction upon a charge not made would be sheer denial of due process." *Accord*, *Cole* v. *Arkansas*, 333 U. S. 196, 201.

The Appellate Division, while not expressly dealing with this question, ruled that there had been a variance, and that failure to object to the variance on trial prohibited the raising of the question later on appeal. But this was not a mere variance in the date of the offense charged; there was here a charge, conviction and affirmance on the basis of additional offenses which were never mentioned in the In-

formation. The defendant was actually convicted and sentenced on crimes with which he had not been charged or informed against.

The appropriate remedy for such a situation is unclear, and there may not be any.[12] The Court below has plainly ruled that there is no remedy, where there could have only been rejection of any objection raised at the trial to the introduction of evidence of sales on January 11 and 13 on the grounds of a variance—for the simple reason that the sales on these two days were the only proof whatsoever remotely resembling any proof as to the scienter of the pictures sold on January 18. There would have been no valid reason for objecting to the admission of these materials in evidence, for they might conceivably have been some evidence of scienter. Nor would objection at the time of admission into evidence have been any protection whatsoever against finding appellant guilty on the materials with which he had not been charged. The vice lay not primarily in admitting these materials into evidence, but in the District Attorney's inviting the court to convict on the basis of these materials as to which appellant had never been charged, and now lies in the Appellate Dvision's affirmance on the theory that all the materials involved are obscene, including materials with which the defendant had never been charged.

More simply stated, there was here no mere variance; the material involved was clearly admissible in any event, and therefore its admission could not have been forestalled by any claimed variance on the trial; in plain fact, the

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[12] See *People* v. *Barr*, 12 A. D. 2d 722, 208 N. Y. S. 2d 339 (4th Dept., 1960), ruling that the defendant "may well have been convicted of a crime of which he had been not indicted contrary to the provisions of Article I, Section 6 of the Constitution of New York. The appropriate remedy in this situation, *if there is any*, is unclear under the authorities [citations omitted, emphasis supplied]".

appellant was convicted on charges never made.[13] And there is no remedy for this under New York law.

There may be some question as to whether this question is properly before this Court on the theory that it may have been disposed of by the state court upon an adequate state ground, to wit, the failure to raise the claim of a variance. To this there are two answers: (1) The answer we have already given, which is that it was not the variance to which we object, not a mere error in the date of the offense charged, but a trial and conviction for offenses additional to those with which the defendant had been charged; and (2) Since the Appellate Division did expressly certify that it had passed upon and necessarily decided the question of whether the defendant had been deprived of liberty without due process, this question is before this Court, even though it could conceivably have been disposed of on an adequate state ground. *Irvin* v. *Dowd*, 359 U. S. 394. This Court is bound by New York's amendment of the remittitur, as it held only the other day in *Willner, supra*. *Accord, Lynumn* v. *Illinois*, 372 U. S. 528.

* * *

We submit that this case, when and if added to this Court's calendar for next Term along with *Jacobellis, supra*, and the presently pending California case re "Tropic of Cancer", would help round out the various situations to which obscenity laws are addressed. *Jacobellis* involves a superbly artistic work, devoid of vulgarity but plain in its suggestiveness of normal sex; "Tropic of Cancer" involves a work whose artistic merit is in controversy, dealing in

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[13] Cf. *Stirone* v. *United States*, 361 U. S. 212, 217: "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error."

the plainest and most explicit and vulgar terms with normal and so-called perverted sex; the case at bar involves a book of lesser artistic merit, no vulgarity and no explicitness, but which contains suggestions of perverted sex, relevant to its dominant theme of the regeneration of a debauche, disgusted and revolted at perversions and excesses, who finally turns to a girl who gives him normal love. This would present an intriguing trio of cases for this Court.

We note, too, that while this Court normally would not grant review if a sentence could be upheld on any count when sentences are concurrent, the Appellate Division in New York frequently revises sentences (or remands them for revision), even when sentences on all counts are concurrent, if it reverses but some of the counts. E.g., *People* v. *Ulisano*, — A. D. 2d — , 239 N. Y. S. 2d 983 (3rd Dept., 1963); cf. *Matter of Theodore* v. *State Liquor Authority*, 16 A. D. 2d 1035, 230 N. Y. S. 2d 250 (4th Dept., 1962). Thus, even should this Court deem reversible only the conviction on the pictures, or only on the book, a remand would be advisable and necessary to determine the appropriate punishment.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Appellant.

Appendix A

(Order Denying Leave to Appeal to Court of Appeals)

COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

HARRY FRIED,
Defendant-Appellant.

CERTIFICATE

I, STANLEY H. FULD, Associate Judge of the Court of Appeals of the State of New York, certify that defendant-appellant, Harry Fried, through his attorney Herbert Monte Levy, Esq., after notice to the District Attorney of New York County, and within the time and in the manner prescribed by Section 520 of the New York Code of Criminal Procedure, duly presented to me an application for a certificate that a question of law was involved in the above matter which ought to be reviewed by the Court of Appeals. In such application, it is argued that the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, made and entered on the 26th day of March, 1963, modifying and as modified affirming the judgment of conviction of defendant-appellant in the Court of Special Sessions of the City of New York, County of New York, upon the charge of violating Section 1141 of the Penal Law of the State of New York, is contrary to the United States Constitution, Fourteenth Amendment, because said statute, as construed and applied,

is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution, as more fully set forth in defendant-appellant's briefs filed in the said Appellate Division, and submitted before me, and in that defendant was otherwise deprived of liberty without the due process of law required by the said Fourteenth Amendment to the United States Constitution, as more fully set forth in said briefs submitted before me.

After hearing counsel and upon the record and proceedings herein, I am denying the application because, in my opinion, no question of law is presented which ought to be reviewed by the Court of Appeals and I accordingly deny permission to appeal.

Dated: New York, New York,
April 17, 1963.

STANLEY H. FULD,
Associate Judge of the Court of Appeals.

Appendix B

(Memorandum Decision of Appellate Division of the Supreme Court of the State of New York, First Department)

5717—*People* v. *Fried*

MEMO FOR THE LIST

Judgment rendered April 17, 1962, convicting defendant of violating section 1141 of the Penal Law (obscene prints and articles), unanimously modified, on the law and on the facts, to the extent of dismissing the third count of the information, and, as so modified, affirmed.

The evidence of scienter on the third count is insufficient. The proof establishes beyond a reasonable doubt the defendant's guilt on the remaining three counts charging that he held out for sale and sold the described photographs and book, which are obscene within the meaning of section 1141. (*People* v. *Finkelstein*, 11 N Y 2d 300.) No objection was made to the receipt of the photographs purchased on January 11 and 13, 1961 on the ground that the information referred only to photographs purchased on January 18, 1961. Having failed to object to the variance, the question may not be raised for the first time on appeal. (*People* v. *McCarthy*, 250 N. Y. 358, 363; *People* v. *Formosa*, 131 N. Y. 478.)

We do not find the sentence to be excessive.

March 12, 1963.

Appendix C

(Order of Appellate Division Amending Remittitur)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 2nd day of May, 1963.

Present:

HON. BERNARD BOTEIN,
Presiding Justice.
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" ARON STEUER,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HARRY FRIED,
Defendant-Appellant.

The above-named defendant-appellant having moved for leave to reargue his appeal from the judgment of the Court of Special Sessions of the City of New York, New York County, rendered on April 17, 1962, which judgment was unanimously modified by order of this Court, entered on March 26, 1963; amending the remittitur; staying the execution on the judgment of conviction pending the determination by the Supreme Court of the United States of a petition for certiorari; and for other relief,

Now, on reading and filing the order to show cause, with proof of due service thereof, and the affidavit of Herbert Monte Levy in support of said motion, and the affidavit of Richard R. Lutz in opposition thereto, and

after hearing Mr. Herbert Monte Levy for the motion, and Mr. Richard R. Lutz opposed,

It is ordered that the said motion be and the same hereby is granted to the extent of amending the remittitur to recite the following: "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: defendant-appellant contended that he was deprived of liberty without due process of law in violation of the Due Process of Law clause of the Fourteenth Amendment to the United States Constitution, and that Section 1141 of the New York Penal Law, as construed and applied herein, is repugnant to the aforesaid Due Process clause. The Appellate Division, First Department, held that defendant-appellant was not denied due process in violation of such constitutional rights, and that the said statute, as construed and applied, was not in violation of the said constitutional provision." In all other respects, the motion is denied.

Enter,

VINCENT A. MASSI,
Clerk.

Appendix D

(Order Appealed From)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 26th day of March, 1963.

Present:

HON. BERNARD BOTEIN,
Presiding Justice.
" FRANCIS L. VALENTE,
" JAMES B. N. MCNALLY,
" HAROLD A. STEVENS,
" ARON STEUER,
Justices.

5717

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

HARRY FRIED,
Defendant-Appellant.

ORDER ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Court of Special Sessions of the City of New York, New York County, rendered on the 17th day of April, 1962, convicting him of violation of Section 1141 of the Penal Law (Obscene Prints and Articles), and said appeal having been argued by Mr. Herbert Monte Levy of counsel for the

appellant, and by Mr. Richard R. Lutz of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It hereby is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby modified, on the law and on the facts, to the extent of dismissing the third count of the information, and, as so modified, affirmed.

Enter:

VINCENT A. MASSI,
Clerk.

Appendix E

(Pertinent Parts of Section 1141 of the New York Penal Law)

§ 1141. OBSCENE PRINTS AND ARTICLES

1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, * * * or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book, * * * drawing, photograph, motion picture film, figure, image, * * *

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than one hundred fifty dollars nor more than two thousand dollars or both fine and imprisonment for the first offense; for a second offense, shall be sentenced to not less than thirty days nor more than one year or be fined not less than two hundred fifty dollars nor more than three thousand dollars or be both fined and imprisoned; for a third offense, shall be sentenced to an indeterminate term of not less than six months nor more than three years and in addition thereto may be fined not more than five thousand dollars.

* * *

5. The publication for sale of any book, magazine or pamphlet designed, composed or illustrated as a whole to appeal to and commercially exploit prurient interest by combining covers, pictures, drawings, illustrations, caricatures, cartoons, words, stories and advertisements or any combination or combinations thereof devoted to the description, portrayal or deliberate suggestion of illicit sex, including adultery, prostitution, fornication, sexual crime and sexual perversion or to the exploitation of sex and

nudity by the presentation of nude or partially nude female figures, posed, photographed or otherwise presented in a manner calculated to provoke or incite prurient interest, or any combination or combinations thereof, shall be a violation of this section. As amended L.1950, c. 623, §§ 1-3; L.1950, c. 624; L.1954, c. 703; L.1955, c. 837; L.1956, cc. 423, 661, 662, 681; L.1957, c. 690; L.1958, cc. 735, 736, eff. July 1, 1958, L.1958, c. 737, §§1, 2, eff. July 1, 1958. . . .

. . .

MOTION
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Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 330

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Appellee,

against

HARRY FRIED,

Defendant-Appellant.

MOTION OF APPELLEE PEOPLE OF STATE OF NEW YORK TO DISMISS

FRANK S. HOGAN
District Attorney
New York County
Attorney for Plaintiff-Appellee
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New York 13, New York

H. RICHARD UVILLER
STANLEY B. GRUBER
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IN THE

Supreme Court of the United States

October Term, 1963

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Appellee,

against

HARRY FRIED,

Defendant-Appellant.

MOTION OF APPELLEE PEOPLE OF STATE OF NEW YORK TO DISMISS

Appellee People of the State of New York, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the ground that the appeal does not present a substantial federal question.

Statement of the Case

On April 17, 1962, the appellant, after a trial in the Court of Special Sessions, New York County, was convicted of four counts of violating Section 1141 of the New York Penal Law, which prohibits, *inter alia*, the sale, or possession with intent to sell, of obscene books and photographs. The appellant was sentenced to serve sixty days in prison on each count, the terms to run concurrently. He is presently at liberty pursuant to a certificate of reasonable doubt.

Timely appeal was taken to the Appellate Division, First Department, of the State of New York, and on March 12, 1963, that court, in a memorandum opinion, dismissed the third count of the information due to the insufficiency of the evidence of *scienter*, and unanimously affirmed, as modified, the decision below.

A subsequent application for leave to appeal to the Court of Appeals was denied by Judge FULD on April 17, 1963. Thereupon, appellant moved for leave to reargue his appeal in the Appellate Division and for an amendment of the remittitur. That court amended the remittitur to read as follows:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: defendant-appellant contended that he was deprived of liberty without due process of law in violation of the Due Process of Law clause of the Fourteenth Amendment to the United States Constitution, and that Section 1141 of the New

> York Penal Law, as construed and applied herein, is repugnant to the aforesaid Due Process clause. The Appellate Division, First Department, held that defendant-appellant was not denied due process in violation of such constitutional rights, and that the said statute, as construed and applied, was not in violation of the said constitutional provision."

The motion was denied in all other respects.

The testimony at the trial indicated that the arresting officer entered the appellant's bookstore at 809 8th Avenue in the City of New York, on January 18, 1961, and saw the appellant there. He had no conversation with the appellant on that occasion, but purchased a set of photographs. He then arrested the appellant.

The patrolman had been in the premises a week earlier when he observed the appellant standing on a platform behind a counter; on his left was a drawer full of photographs. The officer selected three sets of photographs and placed them on the counter in front of the appellant. He asked if the appellant had any better pictures and the appellant told him that those were all he had at the time.

The officer also selected a book entitled "College for Sinners" from the bookrack, took it over to the counter and showed it to the appellant. He asked the appellant, "How is this book?" and was told that, "all of them are about the same." He paid the appellant a total of $3.00 for the book and the pictures.

The officer also visited the bookstore on January 13, 1962, saw the appellant behind the counter, and selected

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two sets of pictures from the drawer on the appellant's left; he purchased the pictures and a book entitled "Sex Cat" without conversing with the appellant.

At the time Patrolman Singleton purchased the pictures each set was in a cellophane-wrapped packet; only one or two pictures in each packet were visible through the wrapper. The book was a "Night Stand" pocket edition; it was closed when he handed it to the appellant to be wrapped.

The Federal Questions Presented are Not Substantial

The questions presented by appellant are whether:

(1) Section 1141 of the New York Penal Law, as construed and applied below, is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution because it punishes a bookseller for the sale of obscene material (a) in the absence of any proof of actual knowledge of its obscenity and (b) in the absence of any proof of constructive knowledge of its obscenity through notice given pursuant to Section 22-a of the New York Code of Criminal Procedure

(2) The said Section, as construed and applied in this case, is repugnant to the said due process clause, because it permits a finding of scienter as to all photographs of females sold on several different days, at an ordinary price, when the sole proof of scienter is that on the first day, after the customer selected three sets of pictures in cellophane packs, he placed them in front of the bookseller,

inquired of the bookseller if he had any better pictures, and the bookseller replied that's all he had at the time, especially when the three cellophane packs contained pictures which could not possibly be deemed obscene (showing neither breasts, buttocks, pubic hair nor genitalia)

(3) Said Section, as construed and applied below, is repugnant to the said due process clause, because it permits a finding of scienter as to the sale of a paper-covered book, at a normal and ordinary price (50¢), when the sole proof of scienter is that after the customer selected a book from a rack, he held it up before the bookseller, asked "How is this book?", and the bookseller replied that all of them are about the same, especially when many other books in the store were concededly not obscene

(4) Pictures of females in the nude and partially nude may not be deemed criminally obscene, consistently with the said due process clause, when neither the female genitalia nor pubic hair is exposed or shown; the statute construed and applied to ban same is repugnant to the said due process clause

(5) A book such as "College for Sinners"—possessing some literary merit, omitting any and all terms descriptive of genital areas, containing no description or representation of any normal or abnormal sex act, omitting all foul and vile language, but containing passages suggestive of abnormal or perverted acts relevant to its dominant theme, nowhere going beyond contemporary community standards—may not be deemed criminally obscene, consistently with the aforesaid due process clause; and the statute as construed and ap-

plied to render the book criminally obscene is repugnant to due process

(6) Appellant was deprived of liberty without due process of law, because the pictures upon which he was convicted were not described or identified with any exactness whatsoever, but were merely described in the statutory language

(7) Appellant was deprived of liberty without due process of law because of conviction and affirmance of conviction on the basis of sixty photographs sold by him as to which no charge had been made, rather than on the basis of twelve innocuous pictures as to which he had been charged.

None of the seven questions enumerated by the appellant presents a substantial federal issue, and in addition, Questions 6 and 7 are not properly addressed to the appeal jurisdiction of this Court.

I

Section 1141 of the New York Penal Law does not punish a bookseller for the sale of obscene material (a) in the absence of any proof of actual knowledge of its obscenity and (b) in the absence of any proof of constructive knowledge of its obscenity through notice given pursuant to Section 22-a of the New York Code of Criminal Procedure, and hence, is not repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

In *People* v. *Finkelstein*, 9 N. Y. 2d 342, 214 N. Y. S. 2d 363 (1961), the Court of Appeals of the State of New York expressly held that Section 1141 of the New York Penal Law required that proof of *scienter* be adduced before a conviction under that section could be upheld. This holding arose in response to a decision of this Court in *Smith* v. *California*, 361 U. S. 147, which struck down a Los Angeles City ordinance proscribing mere possession of obscene photographs, regardless of the offender's knowledge of the contents. Indeed, the opinion of the Appellate Division which is the subject of this appeal adhered to the holding in *People* v. *Finkelstein*, *supra*, by dismissing the third count of the information due to the insufficient evidence of *scienter*.

Since the highest state court has held that the requirements of proof under Section 1141 must conform to the constitutional standards enunciated by this Court in *Smith* v. *California*, *supra*, with regard to *scienter*, it is manifest that appellant's Question 1 does not present a sub-

stantial federal question to this Court. In point of fact there is no federal question at all with regard to the construction of Section 1141, since of course this Court must accept the interpretation of a state's statute by its court of last resort unless in conflict with the Constitution. *Williams* v. *Oklahoma*, 358 U. S. 576.

As proof of knowledge is a requisite for conviction under Section 1141, the need for discussion of the provisions of Section 22-a of the New York Code of Criminal Procedure is obviated.

II

Section 1141, as construed and applied in this case, does not violate the said due process clause, since evidence of *scienter* was presented prior to the obtaining of a conviction under said section.

Appellant's Questions 2 and 3 assert that Section 1141 does not meet constitutional standards in that a conviction may be obtained under said section even though there is complete lack of evidence of guilt, as was the case in *Thompson* v. *City of Louisville*, 362 U. S. 199. The simple answer to this contention is that the trial record, far from being devoid of evidence, reveals sufficient evidence of appellant's knowledge of the contents of the book and photographs in issue.

On January 11, 1961, the first of the three occasions upon which Patrolman Singleton made purchases, he bought three sets of pictures and the book "College for

Sinners" from the appellant. He selected the pictures from a drawer full of photographs to the appellant's left behind the counter. After placing them on the counter in front of the appellant the patrolman asked him if he had any better ones and was told that's all the appellant had at that time. The officer then selected "College for Sinners" from the rack, held it up to the appellant and asked, "How is this book?". He received the reply that, "all of them are about the same". The officer paid a total of $3.00 for the book and the pictures, which the appellant wrapped (*ibid.*).

From the above it can readily be inferred that the appellant knew the contents of the material sold. The pictures from which the selection was made were kept in a drawer behind the counter next to the appellant, not out on the counters. While it is true that only one or two pictures in each packet could be visible to the appellant through the glassine envelopes, he indicated familiarity with the stock by his reply to Patrolman Singleton's question about better ones. Unlike a book, very little effort is needed to know the contents of a set of pictures. Seeing the visible pictures surely was enough to alert the seller to the nature of the pictures he was selling. Moreover, the price charged for the pictures ($2.50 for the three sets of twelve) was an indication that there was something unusual about them. No case has been cited in which *scienter* became an issue where sale of photographs was involved. The nature of the subject matter is such that very little more than proof of handling and sale is needed to establish knowledge.

III

The judicial determination that the photographs and the book "College for Sinners", sold by the appellant, were criminally obscene under Section 1141, was consistent with the due process clause since the determination conformed to the standards established by this Court.

In *Roth* v. *United States*, 354 U. S. 476, this Court carefully delineated an appropriate test for determining whether material could be classified as obscene and thus without the protection of the First Amendment. Since that decision, the Court has had further occasion to examine the limits of obscenity. *Manual Enterprises* v. *Day*, 370 U. S. 478. The New York courts, in expressing their formulation of the meaning of the term "obscenity", have conformed to the standards announced in *Roth*, and in fact have espoused a rule which may well exclude material considered obscene under the *Roth* test.

> "Mindful of the constitutional necessity to open the door barring state intrusion into this area 'only the slightest crack necessary' * * * and desirous of erecting a standard which embodies the most universal moral sensibilities and may be applied objectively, we are of the opinion that the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed 'hard-core pornography'. The mere undemonstrated possibility of harm to the community from realistic accounts of normal sexuality is not of sufficient moment to warrant the exercise of the public force in their suppression. And this is true whether the narratives concerned may be said to have artistic

IV

Appellant's Questions 6 and 7 are not properly addressed to the appeal jurisdiction of this Court since they do not draw in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States.

Appellant contends that he was deprived of liberty without due process of law, because the pictures upon which he was convicted were not described or identified with sufficient exactitude in the information.

Without discussing the merits of this allegation, it is clear that this question does not conform to the mandate of 28 U. S. C. A. 1257(2), which defines the limits of this Court's power to review judgments of a State court brought on Appeal. Since appellant's Questions 6 and 7 do not draw "in question the validity of a statute of any state on the ground of its being repugnant to the Constitution [] of the United States", they are not within the appeal jurisdiction of this Court.

Moreover, an adequate state ground exists for the determination of Question 7. There, appellant alleged that there was a variance between certain portions of the appellee's proof and the information. The opinion of the Appellate Division noted that failure to object to the variance on trial barred any subsequent raising of the question on appeal. This was in accord with the New York authority on this point. *People v. McCarthy*, 250 N. Y. 358; *People v. Formosa*, 131 N. Y. 478. When an adequate

state ground exists as a basis for a judgment this Court has held that it will not subject that decision to review. *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278; *Williams* v. *Kaiser*, 323 U. S. 471.

Conclusion

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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